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No. 605.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

AMERICAN PROPELLER AND MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF AMERICAN PROPELLER AND MANUFACTURING COMPANY.

J. KEMP BARTLETT,
EDGAR ALLAN POE,
PAUL F. MYERS,
JOHN R. YATES,

Counsel for Petitioner.

King Bros., Inc., Printers, 208 N. Calvert St., Baltimore, Md.

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In the brief filed on behalf of the United States (page 6), Counsel for the United States, while admitting that under the authority of Ford Motor Co. v. United States, 9 F. Supp. 590, 602 (C. Cls.), in which case *certiorari* was denied by this Court, 296 U. S. 636, and of Standard Oil Co. v. United States, 10 F. Supp. 550, 562 (C. Cls.) interest should not have been allowed by the Court of Claims on the deficiency tax claim of The United States against American Propeller and Manufacturing Company, nevertheless contend that those cases and the decisions therein are not applicable here because the Peti-

tioner has not specially and expressly set up, in its petition for a *writ of certiorari*, this precise error as one of the reasons why the writ should be granted.

We respectfully submit that this contention of the Counsel for the United States is untenable.

The question before this Court, on the pending petition, is whether the Court of Claims *erred in allowing interest* on the Government's counterclaim against the Petitioner, based upon the *deficiency assessment*.

The writ should manifestly be granted if it is evident to this Court, for any reason appearing upon the face of the record that interest was improperly allowed; otherwise the Court would be denying redress to the Petitioner, although its right to redress was apparent. As interest was improperly allowed, the writ should be granted.

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BRIEF ON BEHALF OF PETITIONER.

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BRIEF ON BEHALF OF PETITIONER.

I.

History of the Litigation.

On February 25, 1922, an original petition was filed by the petitioner (R. 1), and on May 7, 1935, an amended petition was filed (R. 1), alleging breach by the United States, the respondent herein, of five formal contracts entered into by it with the petitioner for the manufacture of propellers for airplanes during the emergency arising from the declaration by Congress, on April 6, 1917, that a

state of war existed between the United States and the Imperial German Government.

These contracts were entered into on behalf of the respondent by officers who acted under the authority of the Secretary of War. Claims for breach by the respondent of each of these contracts were presented to the War Department during the month of September, 1918, and, on or about November 22, 1918, a settlement agreement was made with the petitioner, on behalf of the respondent, by officers of the War Department, who also acted under the authority of the Secretary of War (R. 6-9). The settlement agreement, referred to as the Potter-Downey Agreement, as well as the original contracts, are all set forth in the petition and the amended petition. The settlement agreement was never performed by the respondent.

Peitioner's net claim, in the amount of $144,238.03 (R. 16), after giving respondent credit for walnut lumber furnished by it for use in the manufacture of propellers, was disputed in its entirety and testimony was offered pro and con the merits of this issue.

On May 13, 1935, the respondent filed a general traverse to the amended petition (R. 41).

On November 12, 1927, respondent filed an amended counterclaim to the original petition, including therein a deficiency income and excess profits tax assessment for $191,413.04 against the petitioner for the year 1918, which assessment had been made on the 14th day of June, 1924 (R. 42).

Petitioner's replication to respondent's counterclaim (R. 43), having by leave of Court been filed on October 9, 1931, denied that any liability existed for the additional taxes sought to be imposed by said assessment, and testimony was offered pro and con this issue on the merits of the counter-claim.

The Court of Claims, on April 6, 1936, made special Findings of fact (R. 46-70), and conclusions of law (R.

70). In its opinion the Court of Claims, at page 77 of the record, said:

> "The facts which support the eight items or claims made on behalf of plaintiff upon which defendant concedes plaintiff is entitled to recover are set out in Findings 18, 19, 20, 21, 22, 24, 33 and 34. The total of the items conceded in plaintiff's favor is $385,717.29. Adding this amount to the total of the amount allowed plaintiff on the disputed claims, we find that the aggregate sum allowed plaintiff is $557,304.05. From this should be deducted $437,891.01, which plaintiff concedes is due defendant for lumber. The balance, $119,413.04, is the amount we find plaintiff is entitled to recover on the various claims set out in its petition. Plaintiff claims to be entitled to interest on part of this sum, but plaintiff's recovery is not based upon a statute which awards 'just compensation', and under the general rules with reference to contracts no interest can be allowed."

Upon respondent's counterclaim the Court of Claims, at pages 81 to 83 of the record, held:

> "After making the corrections in invested capital and net income as stated above, we find that the 1918 tax of plaintiff should be computed on the basis of $103,071.67 as the invested capital, and $171,546.00 as the net income. Making the calculations on this basis we find that the excess profits tax of plaintiff for 1918 is $100,916.17, and its income tax $8,235.58, making a total of $109,151.75. Plaintiff paid on its tax for that year $48,778.31. The tax was therefore underpaid in the sum of $60,373.44.
>
> "The circumstances of the case cause the question to arise as to whether the defendant should be allowed interest on the deficiency for 1918. We have already found and determined that at the close of 1918 defendant was indebted to plaintiff on the matters which form the basis of plaintiff's suit in a sum much larger than the amount of this tax, but we have also decided that plaintiff could not be allowed any interest thereon. The statute provides for interest on the tax from the time it was assessed, and it may

seem quite inequitable that the defendant should be allowed interest on the amount of this tax for a number of years during all of which it was indebted to the plaintiff. If the case were between private individuals to be decided upon their respective claims, such a result would not follow; but, as was said in United States *v.* Verdier, 164 U. S., 213, 218:

"'* * * we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes.'

* * * * * * *

"Interest will be computed on the amount of plaintiff's tax for 1918 at six per cent from June 14, 1924, when the Commissioner made the additional assessment, to the date of the judgment herein, April 6, 1936. The interest so computed is $42,784.64 which, added to the amount of the underpayment of the tax, makes a total of $103,158.08 due defendant upon its counter-claim. Subtracting this from the amount which we have found plaintiff is entitled to recover on the cause of action set out in its petition, the balance in favor of plaintiff is $16,254.96, for which judgment will be entered in its favor accordingly."

On June 2, 1936, the petitioner filed its motion for a modification *upon the question only* of the allowance of interest upon the counterclaim of the respondent (R. 43).

On June 5, 1936, the respondent filed its motion for a new trial and with it a motion for leave to file (which leave was granted), a memorandum re judgment, accompanied by a calculation of the tax, purporting to show that the Court had made a mistake in its own calculation.

On October 5, 1936, the Court handed down a memorandum opinion, holding in part as follows:

"The plaintiff does not now ask that interest should be computed on the amount of its recovery, but contends that so far as necessary the amount to which it was found entitled should be applied upon the tax to extinguish it, which to this extent would have the same effect as if interest were allowed. But we can find no authority for applying in payment

upon a tax previously assessed the amount later allowed by the court on an unliquidated and disputed claim not relating to taxes. *The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on the plaintiff's claim.* In this matter we are compelled to follow the law as we find it. The motion of the Plaintiff must be over-ruled" (R. 45). (Italics supplied.)

The Court, upon respondent's motion, sustained the respondent's calculation of the disputed tax and found the unpaid part thereof to be the sum of $82,701.29 (R. 45), instead of $60,373.44, as originally found, and found the interest thereon to be the sum of $58,607.64 (R. 45), thus making the Court's total allowance to the respondent upon the counterclaim $141,308.93 (R. 45). The Court then deducted from the last-mentioned sum $119,413.04 (R. 45), representing the allowance it had made to the petitioner upon its claim, and extended a judgment against the petitioner for the difference so ascertained, or the sum of $21,895.89.

Opinion Below.

The opinion of the Court of Claims of the United States is reported in 14 Fed. Supp., at pages 168, etc., and the Court's order of Oct. 5, 1936, modifying the judgment, will be found at page 44 of the record.

II.

Argument.

The question, and the sole question before the Court, is "Did the Court of Claims err in allowing interest on the $82,701.29 found by the Court of Claims to be due The United States by the American Propeller and Manufacturing Company as an additional income and excess profit tax for the year 1918?"